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SUPREME COURT, U.S.
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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No. 538

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HARRY N. SOUTHARD,
Petitioner,
against
HARRY JACKSON, Warden Michigan State Prison, Jackson, Michigan,
Respondent.

PETITION FOR CERTIORARI TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF MICHIGAN IN THE MATTER OF THE APPLICATION OF HARRY N. SOUTHARD FOR A WRIT OF HABEAS CORPUS

HARRY N. SOUTHARD, *Petitioner,* by
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His Solicitors.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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HARRY N. SOUTHARD,
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against
HARRY JACKSON, Warden Michigan State Prison, Jackson, Michigan,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

To the Honorable, the Supreme Court of the United States:

Harry N. Southard respectfully petitions the Supreme Court of the United States for issuance of a writ of certiorari, directed to the Supreme Court of the State of Michigan to review the final judgment of the court entered June 2, 1941 denying to your petitioner a writ of habeas corpus to be relieved from imprisonment in the Michigan Penitentiary, Jackson, Michigan, under sentence of minimum 15 years, maximum 25 years. Entered November 1, 1933.

I.

Questions Presented

A prior act in Michigan providing for an Indeterminate Sentence was declared unconstitutional (*People v. Cummings*, 88 Mich. 249, (50 N. W. 310, 14 L. R. A. 285)). In order to establish equality and uniformity in sentences for crime the People of Michigan adopted a constitutional amendment authorizing such sentences.

(Section 28, Art. V, Constitution of 1908);
(Art IV, Sec. 47, Constitution of 1850, amended in 1902).

The Legislature in 1903 enacted what was called an Indeterminate Sentence Law and amended it in 1905. The intent and purpose of the Constitutional Amendment was the elimination of the evils inherent in the fixed sentence or flat sentence system that then prevailed. The act of 1903 as amended in 1905 is not in fact an Indeterminate Sentence Act and it does not eliminate the evils of the fixed sentence system. On the contrary the statute directs the Court to fix a "Minimum term" (with no law or standard to guide it) and this power to fix a minimum term retains and increases the evils inherent in the fixed sentence system. A Real Indeterminate Sentence Law fixes by law a minimum and maximum. This act makes the statutory maximum the maximum. The opinion of the Supreme Court of Michigan of June 2, 1941 in this case sustains and expands the arbitrary uncontrolled judicial discretion of the Court in fixing the minimum sentence and the minimum may be anything from one day to the maximum fixed by law. In fact in some cases the courts of Michigan have made the maximum into the minimum and thereby sentenced defendants for the maximum term with no Indeterminate features of any kind. The *"Inherent powers of the Judiciary to fix the Minimum"* operates to create an inequality and lack of uniformity in sentences more glaring than the evils of that kind that existed under the flat or fixed sentence system. The statute does not correct the evils — it increases the evils and substitutes the Rule of Men for a Rule of

Law. The statute reverses and frustrates the will of the People of Michigan expressed in the Constitutional Amendment.

A statute authorizing the Court to fix a minimum at anything from one day to the maximum cannot eliminate the evils of a flat sentence system. In operation this Michigan statute is a flat sentence plus an additional term extending to the maximum. The Constitutional Amendment of 1902 did not contemplate such a continuation of the flat or fixed sentence system in the guise of an Indeterminate Sentence Act.

The Statute contradicts the Constitutional Amendment.

The questions arise:

(1) When a purported Indeterminate Sentence Act operates to reverse and frustrate a constitutional amendment and to retain and increase the evils of the fixed or flat sentence system is a sentence under such a pretended Indeterminate Sentence Act the due process of law required under the 14th Amendment to the Constitution of the United States.

(2) Does a sentence under such a law deprive a defendant of the equal protection of the law — as guaranteed by the 14th Amendment.

(3) Petitioner was sentenced under the Michigan so-called Indeterminate Sentence Law for an alleged first offense and subsequently sentenced as for a third felony under the terms of the Habitual Criminal Act of Michigan — (Sections 8 and 11 Chapter 9 Statutes). Does such procedure constitute due process of law and is a sentence under such an Indeterminate Sentence Law and Habitual Criminal Act in accord with due process of law?

(4) Section 8 Chapter IX of the Michigan Code sets up the basic first offense sentence under the so-called Indeterminate Sentence Act. Sections 9-10-11 and 12 of Chapter IX constitute the Habitual Criminal Statute and provide for increased penalties for second, third and fourth conviction. Is a basic first conviction and sentence necessary as due process of law before there can be a

valid second offense sentence? If the basic first offense conviction and sentence are void can there be, as due process, any second, third or fourth sentence based thereon?

(5) If the basic first offense sentence is void under a void statute is there any valid basis for a second, third or fourth offense sentence under such an act and is such a sentence for third offense due process of law?

(6) Has the Supreme Court of Michigan denied due process of law to Petitioner by denial of relief and release under invalid statutes?

(7) Is the requirement of the statute that the Court "fix a minimum" term a delegation of Legislative power to the Judiciary and does it constitute due process of law under the 14th amendment where the power to fix the minimum is uncontrolled and arbitrary and without any standard to guide the Court, and the minimum can range from one day to the maximum in the uncontrolled discretion of the Court?

(8) Is the requirement of the statute that the Court "fix the minimum" term a denial of due process of law in a state in which its Supreme Court has repeatedly held that it is the duty of the Legislature alone to fix the minimum and maximum of the punishment for crimes?

(9) Is the "Inherent power of the Judiciary to exercise discretion in the imposition of sentences" that existed under the laws relating to fixed or definite term sentences still valid and in effect under the Constitutional Amendment to the Michigan Constitution providing for the enactment of Indeterminate Sentence Laws? Can the theory of the indeterminate sentence system be reconciled to such exercise of unlimited Judicial discretion and is such exercise of unlimited discretion due process of law under the 14th amendment of the United States Constitution.

II.

Summary of Proceedings on which Questions Here Presented Arise

On November 1, 1933 Petitioner Harry N. Southard was convicted in St. Clair County, State of Michigan, of the crime of robbery-armed as a third felony and he was sentenced by the Court for a minimum term of 15 years and a maximum term of 25 years.

The Information recited:

(1) March 31, 1931, Larceny, being first offense.

(2) June 27, 1932, carrying concealed weapon, being second offense.

(3) July 1, 1933, assault and larceny, a third offense.

All these offenses are laid in St. Clair County, Michigan.

Your Petitioner is imprisoned under the terms of an act entitled, "Code of Criminal Procedure" and specifically under sections 8, 9, 10, 11 and 12 of Chapter 9 thereof (Said Sections refer to Michigan Statutes Annotated (Vol. 25) under 28.1080, 28.1081, 28.1082, 28.1083 and 28.1084) and particularly under Sections 8 and 11 upon a third conviction.

Petitioner set up in his Petition for Habeas Corpus filed in the Michigan Supreme Court that the sentence under which Petitioner is imprisoned, i.e., sentence of November 1, 1933 is illegal and void and without due process of law guaranteed by Article 11 Section 11, of the Constitution of the State of Michigan and the 14th Amendment to the Constitution of the United States.

That said Petition for Habeas Corpus was dismissed by the Supreme Court of Michigan (the Court of last resort) in an opinion and order by the Court of June 2, 1941 and Petitioner was thereby denied relief by the Court of last resort in the State of Michigan. This Petition for Writ of Certiorari is brought to reverse the judgment of the Supreme Court of Michigan so denying

relief to Petitioner and dismissing the Writ of Habeas Corpus entered June 2, 1941.

The Petition for Habeas Corpus sets out in full the Warrant, Information, Plea, Verdict and Journal and Calendar Entries as Exhibits A, B, C, D, E and G. The information recites the first and second conviction and alleges the third offense — all in Michigan and under the statutes here before the Court.

III.

Reasons Relied On for Allowance of Writ

The Supreme Court of Michigan dismissed the Writ of Habeas Corpus and sustained the so-called Indeterminate Sentence Act and the Habitual Criminal Sections of the Act and held same valid thereby retaining in full force and operation the evils of the fixed sentence or flat sentence system that the Constitutional Amendment was intended and adopted to abolish.

The Supreme Court of Michigan invokes the "*Inherent power of the Judiciary to fix minimum sentences*" and that does violence to the indeterminate sentence method authorized by the Constitutional Amendment. The inherent power of the Judiciary to fix definite sentences under the fixed sentence method and the inherent power of the Judiciary to fix minimum sentence under the statute at bar come to the same thing and the same inequality and lack of uniformity are present in each. In fact the evils are increased. Such power to fix minimum sentences frustrates the intent behind the adoption of the Constitutional Amendment and the Michigan Act is void. Section 8 is basic. There can be no second offense sentence until there has been a valid first offense sentence, no third or fourth. Therefore, the invalidity of Section 8 carries down Sections 9-10-11 and 12, Chapter 9 of the act. Acts done under void statutes deny due process of law.

The opinion of the Michigan Supreme Court of June 2, 1941 is contradictory and fails to discuss or decide the issues presented to that Court for decision.

When the Constitutional Amendment used the term "Indeterminate sentences" it had a precise meaning, i.e., a sentence which fixes the period or amount of punishment only within certain limits fixed by the law itself. Leaving the exact term or amount of punishment to be determined by administrative authorities. The Michigan Statute directs the Court to fix the minimum sentence — (the law fixing only the maximum) with the result that all the evils of the flat sentence method are retained and increased. The statute does not conform to the Constitutional Amendment, and therefore denies due process of law to Petitioner.

When the Legislature of Michigan directed the Court to fix the minimum sentence it abdicated its legislative duty to fix the minimum and maximum terms for punishment for crime and thereby delegated legislative power to the Courts. Such delegation of legislative power to the Courts is not in accord with due process of law and not in accord with statutes of other states The Michigan Statute stands alone — a perpetuation of the evils of the flat sentence system under an amendment to the State Constitution intended to eliminate those evils.

The Illinois Crime Survey published in 1929 by the Illinois Association for Criminal Justice said (P. 448):

> "The assumption that the trial judge is in a position to determine properly the length of the sentence is hard to justify."

The Michigan Statute is in word, form and operation directly contrary to the Constitutional Amendment that authorizes a Real Indeterminate Sentence Statute.

See "Indeterminate Sentence Laws — the adolescence of Peno — Correctional Legislation 50 Harvard Law Review 677-687.

None of the benefits sought to be effected by the Constitutional Amendment have been effected because the act frustrates and nullifies the Constitutional Amendment.

The act is null and void. Section 8 is void and carries 9-10-11 and 12 down with it. The act being void the

Michigan Supreme Court should have granted proper relief in Habeas Corpus proceedings. Denial thereof is a denial of due process of law under the 14th Amendment.

Petitioner, therefore, respectfully requests, for the reasons stated, that a Writ of Certiorari issue as prayed.

Respectfully submitted,

HARRY N. SOUTHARD,
Petitioner.
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His Attorneys and Solicitors.

SUPPORTING BRIEF

The Petition for Habeas Corpus in the Supreme Court of Michigan recites:

> (b) That the said sentence as imposed on the 1st day of November, 1933, is illegal, void and without due process of law guaranteed by Article 11, Section 11 of the Constitution of the State of Michigan, and the fourteenth amendment to the Constitution of the United States.

Section 28 of Article V of the Constitution of 1908 of Michigan, reads:

> "The legislature may provide by law for indeterminate sentences, so-called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences."

This provision was an amendment in 1902 (Public Acts 1903, p. 452) of the Constitution of 1850 and then was known as Article IV Sec. 47. It was carried into the Constitution of 1908 as Section 28 Art. V.

Prior to the Amendment of 1902 the Supreme Court of Michigan held an Indeterminate Sentence Act void. (Laws of 1889, Act 228).

> *People v. Cummings*, (1891) 88 Mich. 249, 14 L.R.A. 285.

To avoid the evils of the prior fixed or flat sentence system the people adopted the Constitutional Amendment of 1902. The Legislature thereupon adopted a statute that directs the Court to fix the minimum term. The Act (Sec 8 Chapter 9 of the Code of Criminal Procedure) reads:

> The Court "shall not fix a definite term of imprisonment, but shall fix a minimum term."

This provision retained and increased the evils inherent in the definite term or flat sentence system. The Constitutional Amendment was adopted to abolish these very evils. This statute frustrates the will of the people and each minimum sentence now has all the elements of inequality and lack of uniformity inherent in the flat sentence system.

The "Inherent power of the Judiciary to fix definite terms of imprisonment led to a revolt by the people against the evils of the system."

See "Indeterminate Sentence Laws — The adolescence of Peno — Correctional Legislation" 50 Harvard Law Review 677-687.

The Illinois Crime Survey published in 1929 by the Illinois Association for Criminal Justice said (page 448):

> "The assumption that the trial judge is in a position to determine properly the length of the sentence is hard to justify."

That was true in 1902 in Michigan and let to the adoption of the Constitutional Amendment.

The statute that directs the Court not to fix a definite term of imprisonment but that the Court "shall fix a minimum term" still continues the repudiated idea that the trial Judge is in a position to determine the length of the sentence and the statute retains and increases the evils of that repudiated system.

An indeterminate sentence law in other states and within the meaning of the Michigan Constitutional Amendment is one that has a minimum as well as a maximum fixed by law. That is true in Illinois, Massachusetts and New York. To quote but a few of the state statutes. The Michigan Statute varies from the statutes of Illinois, New York, Massachusetts and many other states.

Illinois. Sec. 802 Ch. 38 Smith-Hurd Statute.

> "The term of such imprisonment or commitment shall be for not less than the minimum nor greater

that the maximum term provided by law for the offense of which the person stands convicted or comitted."

Massachusetts. Sec. 24 Ch. 279.

"The maximum shall not be longer than the longest term fixed by law * * * and the minimum term shall not be less than two and one half years."

New York. Sec. 1931 Ch. 41 Penal laws of New York (Cahill Consolidated laws of New York, 1930-41:1941, 1942) provides for punishment

"within such limits as may be prescribed by this chapter."

Michigan stands alone with a statute under which the Court fixes a minimum sentence, i.e., a sentence that has all the inequality and lack of uniformity of a sentence by the Court for a definite or fixed term. It was the "Inherent judicial power to exercise discretion in the imposition of sentences" that created the conditions that led to the Indeterminate sentence system. That power always resided in the judiciary when they fixed definite terms and it was the abuse of that power that created the demand for revision of the law. The judiciary held the first statutory efforts in that direction to be void. Then came the Constitutional Amendment expressing the will of the people.

But, now again, once more the "Inherent judicial power to exercise discretion in the imposition of sentences" stands between the people of Michigan and their expressed will in their amended Constitution.

The power to exercise discretion in the imposition of sentences, i.e., the power to fix either definite term sentence or to fix minimum term sentences is directly contradictory of the indeterminate sentence system. When the people of Michigan gave permission to the Legislature to enact an indeterminate sentence statute they certainly did not intend any increase and extension of the then and

now existing evils in the matter of uniformity and equality of sentences for crime.

Being a negation of the Constitutional Amendment it is a denial of due process of law.

The inherent power of courts to exercise discretion in the imposition of sentences, as it existed in the time of Blackstone, and as it existed in Michigan down to 1902, was modified by the Constitutional Amendment. The people granted power to enact an indeterminate sentence act and that introduced a new system under which the inherent power of Courts to exercise discretion in the imposition of sentences was eliminated.

The attempt by the Legislature of Michigan to disregard the Constitutional Amendment by the provision that, the Court shall fix the minimum is obviously an open avoidance of the amendment and a retention of the so-called inherent power of Courts to exercise discretion in the imposition of sentences. There can be no such inherent power under an indeterminate sentence act.

The Supreme Court of Michigan failed in its opinion and order of June 2, 1941, to recognize that the Constitutional Amendment established a new method under which the inherent judicial power to exercise discretion no longer exists in the matter of sentences for punishment for crimes.

The people took away that inherent power in 1902 when they authorized the indeterminate sentence method. Legislation that avoids, disregards or defies a Constitutional Amendment is necessarily void.

An indeterminate sentence statute excludes the inherent judicial power to use discretion in fixing sentences and displaced that discretionary power with an administrative system. Removed from the control of the Courts.

Both cannot possibly exist in the same place at the same time. One or the other system must prevail.

The direction in this statute that the court fix the minimum term of imprisonment confers arbitrary powers upon

the judiciary and there is no guide or standard provided in the act. The lack of a standard is an indication of an attempt to confer arbitrary powers.

People v. Sturgeon, 272 Mich. 319 (323) Opinion by Fead, J.;
Hoyt Bros. v. City of Grand Rapids, 260 Mich. 447;
Panama Refining Co. v. Ryan, 293 U. S. 388;
State v. Skinner, 20 Ala. App. 204 101 Southern 327 (329-330);
State v. Williams, 173 La. 1 136 So. 68 (70).

The procedure under this act must be strictly construed.

People v. Brown 253 Mich. 537, citing
People v. Palm, 245 Mich. 396 (403).

The decision of June 2, 1941 in the case at bar held in effect that the inherent judicial power of the court to use discretion extends from one day to the maximum term for any offense. They held that the inherent judicial discretion is wholly without control or limitation.

The Supreme Court of Michigan has held repeatedly that

> "It is the duty of the legislature alone to fix the minimum and maximum of the punishment for crimes."

People vs. Whitney, 105 Mich. 622 (627);
People vs. Palm, 245 Mich. 396 (403);
People vs. Daniel Cummings, 88 Mich. 249 (252);
People vs. Smith, 94 Mich. 644.

It is now held the power to fix the minimum is purely judicial and an inherent judicial power.

There is an irreconciliable conflict between such inherent judicial power to use discretion and the indeterminate sentence system.

The requirement that the court "fix a minimum" term is a delegation of legislative power to the judiciary and

in direct violation of the Constitution of the State of Michigan and the 14th Amendment to the Constitution of the United States. *Sections 8, 9, 10, 11 and 12 Chapter 9 Code of Criminal Procedure known commonly as the Habitual Criminal Act are unconstitutional and void.*

In the recent case of *People v. Palm,* 245 Mich. 396, (403), the Supreme Court of Michigan said:

> "Under our system of state government the legislature makes the law, the governor executes it and the courts construe and enforce it. In *People v. Smith,* 94 Mich. 644-646, this court said:
>
> > 'Upon the legislature alone is conferred the power to fix the minimum and maximum of the punishment for all crimes.' "

In *People v. Whitney,* 105 Mich. 622 (627), the court said:

> "Upon the legislature alone is conferred the power to fix the minimum and maximum of the punishment for all crimes. People v. Smith, 94 Mich. 644."

In *People v. Daniel Cummings,* 88 Mich. 249 (252), the Court, Morse, Judge, said:

> "It is in the power of the Legislature to fix all punishment for crime, and to provide for a Minimum and Maximum punishment."

All these authorities are disregarded in the opinion of June 2, 1941.

In *Rouse v. Thompson,* 228 Ill. 522 (535), the court said:

> "It is well settled that the power delegated to the legislature to make laws cannot be by that body delegated; that the legislature must decide what the law shall be and that the power delegated to that department by the Constitution cannot be again delegated to another body or authority; that a law must be complete in all its terms and conditions when it leaves the legislature.

(Cooley's Const. Lim. 7th Ed. p. 163; 6 Am. & Eng. Ency. of Law, 2nd Ed. — 1021; *Arms v. Ayer*, 192 Ill. 601; *People v. Board of Election Com'rs*, 221 Ill. 9)."

In *Wayman v. Southard*, 10 Wheat. 1. 42, Chief Justice Marshall said:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative."

In *People v. Sturgeon*, 272 Mich. 319-323, the court said: "Fead, J."

> "This court uniformly has held that the lack of a standard is an indication of an attempt to confer arbitrary powers." *Hoyt Bros. v. City of Grand Rapids*, 260 Mich. 447, and other cases.

(325) "An examination of the ordinance demonstrates that it sets up no standard. The determination of the 'proper and suitable person' * * * means that in passing upon the application for license the Commission may establish its own standard and may vary it as to each applicant. The ordinance is invalid. Reversed without new trial."

In *Panama Refining Co. v. Ryan*, 293 U. S. 388, the United States Supreme Court held the attempted delegation of power to the President to be plainly void, the power being legislative power because nowhere in the act did Congress declare or indicate any policy or standard to guide or limit the President when acting under the delegation of power.

In *State v. Skinner*, 20 Ala. App. 204, 101 Southern 327, 329, 330, the court said:

> "There is no fixed standard in these definitions 1 and 3 to go by. * * * It leaves it to be determined by the court or a jury in each particular case. This is not permissible. State v. Goldstein, 207 Ala. 569."

Section 8 is the basic section. Without a first valid sentence there can be no second, third or fourth sentence under the act. Section 8 is void and it carries down all the other sections because they rest upon Section 8. When Section 8 is removed from the act the act cannot operate. The act is void.

Where the act is void there is an entire lack of due process and the sentences of petitioner upon the several convictions are void.

CONCLUSION

The State of Michigan has adopted an act, held valid in the state Court of last resort that repudiates the will of the people. The people recognized the need for indeterminate sentences in criminal cases and they adopted a Constitutional Amendment to establish the indeterminate system. That amendment and the objectives of the indeterminate sentence system are frustrated by the fixing of minimum in the discretion of the Court. The indeterminate sentence system displaced the definite term system and the judicial discretion that fixed the definite term. The so-called minimum under this act is a disguized definite term and has all the evils incident thereto.

The act contravenes the Constitutional Amendment and retains the inherent judicial discretion to impose any kind of a sentence and therefore is neither indeterminate nor valid. See opinion June 2, 1941 in this case.

Being void it follows there was no due process of law.

Amendment 14 to the Constitution reads:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The writ of certiorari has been granted to inquire into denial of procedural due process and equal protection of the law in criminal cases in states courts, as follows:

Snyder v. Commonwealth of Massachusetts, 291 U. S. 97;
Powell v. State of Alabama, 287 U. S. 45;
Norris v. State of Alabama, 294 U. S. 587;
Patterson v. State of Oklahoma, 294 U. S. 600;
Hollins v. Oklahoma, 295 U. S. 394;
Brown v. Mississippi, 297 U. S. 278.

See also:

Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340;
Palko v. State of Connecticut, 58 S. Ct. 149-153.

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OPINION
(Filed June 2, 1941)

STATE OF MICHIGAN
SUPREME COURT

APRIL TERM, 1941

In the matter of
HARRY N. SOUTHARD.

BEFORE THE ENTIRE BENCH

Bushnell, J.

Petitioner, Harry N. Southard, was convicted by a jury on November 1, 1933, of the crime of "robbery-armed, third felony." The offense of robbery-armed is punishable by imprisonment for life or any term of years. Section 529 of the Penal Code, Act No. 328, Pub. Acts 1931, (Stat. Ann. 28.797). Southard was sentenced to serve a minimum term of 15 years and a maximum term of 25 years. Petitioner thereafter filed motions to vacate the sentence, to reduce the sentence, and various interlocutory motions, all of which were denied.

In this petition for a writ of habeas corpus, Southard alleges that "he is not committed or detained by virtue of any process, judgment, decree or execution specified in" 3 Comp. Laws 1929, 15207 (Stat. Ann. 27.2251). He then asserts that "such confinement is by virtue of a warrant of commitment issued out of the Circuit Court for the County of St. Clair, State of Michigan." Petitioner explains this inconsistency by the claim that the statutes under which he was sentenced, namely, "sections 8, 9, 10, 11 and 12 of Chapter IX" of the Code of Criminal Procedure, same being 3 Comp. Laws 1929, 17336-17340 (Stat. Ann. 28.1080-28.1084) are unconstitutional in that there is unlawfully delegated to members of the judicial department of the State government power to fix a mini-

mum term of imprisonment as a punishment for crime, which power resides exclusively in the legislature.

Petitioner's argument is based upon the proposition that, since section 8 of Chapter IX of the code fails to fix a minimum term of imprisonment for a first offense, sentence thereunder is illegal and his first conviction cannot furnish a basis for computing successive convictions under the habitual criminal act (10 et seq., supra).

In the Matter of Homer Franks, ... Mich. ....., decided April 8, 1941, the court said:

> "And if it be assumed that sentencing petitioner as a fourth offender was *unlawful*, rather than irregular, still his right of review was by appeal, not by habeas corpus."

See authorities therein cited in In re Spencer, 252 Mich. 48, and In re Moynahan, 255 Mich. 497.

We have thus repeatedly held that habeas corpus will not be permitted to perform the functions of a writ of error. Petitioner does not question the validity of the habitual criminal act but confines his complaint to the validity of the indeterminate sentence law. Although his remedy is not by habeas corpus and his petition *for that writ was denied*, we shall, however, in this instance re-examine the question of the constitutionality of the indeterminate sentence law. We do this in order that we may again show the futility of continued applications to this court, based upon the claim that the petitioner and others in like circumstances are illegally confined in State institutions.

The habitual criminal act was passed to provide a punishment for repeated commissions of felonies. People v. Palm, 245 Mich. 396. The act is concerned with prior convictions and not the sentences under those convictions. Southard makes no complaint of the validity of any of his three convictions.

The present indeterminate sentence law (3 Comp. Laws 1929, 17336 (Stat. Ann. 28.108033)) came into our criminal procedure by Act No. 136, Pub. Acts 1903, and has been

amended by Act No. 184, Pub. Acts 1905, and No. 259, Pub. Acts 1921, and re-enacted in the Code of Criminal Procedure, Act No. 175, Pub. Acts 1927. This section reads:

> "When any person shall hereafter be convicted for the first (1st) time of crime committed after this act takes effect, the punishment for which prescribed by law may be imprisonment in the state prison at Jackson, the Michigan reformatory at Ionia, the state house of correction and branch of the state prison in the upper peninsula, the Detroit house of correction, or any other prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term except as hereinafter provided. The mamimum (penalty) provided by law shall be the maximum sentence in all cases except as herein provided and shall be stated by the judge in passing sentence. He shall before or at the time of passing such sentence ascertain by examination of such convict on oath, or otherwise, and by such other evidence as can be obtained tending to indicate briefly the causes of the criminal character or conduct of such convict, which facts and such other facts as shall appear to be pertinent in the case, he shall cause to be entered upon the minutes of the court."

In re Lambrecht, 137 Mich. 450, decided in 1904, the court said:

> "After the first act providing for indeterminate sentence was declared unconstitutional (People v. Cummings, 88 Mich. 249 (50 N. W. 310, 14 L. R. A. 285)), the people adopted a constitutional amendment authorizing such sentences. The present act was passed in accord with that amendment." (Referring to the 1903 act.

People v. Cummings was decided in 1891 and dealt with the constitutionality of Act No. 228, Laws of 1889. In that case the act was declared unconstitutional because the Legislature attempted to confer judicial power with respect to length of imprisonment on an administrative body.

In 1902 (see Public Acts of 1903, p. 452) the people amended the Constitution of 1850 by adopting what was thereafter designated as Article IV, 47, which reads:

> "The legislature may, by law, provide for the indeterminate sentences, so-called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences."

This was carried over into the Constitution of 1908. Section 28 of Article V of that Constitution reads:

> "The legislature may provide by law for indeterminate sentences, so-called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences."

Pursuant to the constitutional amendment of 1902, the Legislature in 1903 enacted an indeterminate sentence law. This law was upheld in In re Manaca, 146 Mich. 697. The 1905 amendment of this act was sustained in People v. Cook, 147 Mich. 127.

In re Leonard, 137 Mich. 457, decided the same day, as the Lambrecht case, in affirming a minimum sentence of ten years, the inherent power of the judiciary to fix the minimum term of imprisonment was recognized. The court said:

> "Section 1 of the indeterminate sentence law contains a provision that in all cases where no minimum sentence is fixed by law, the court imposing sentence shall fix such minimum, which shall not be less than six months. Under this provision of the statute, the court was undoubtedly authorized to fix the minimum sentence — none being fixed in the statute prescribing the penalty for the offense of which petitioner was convicted — and the sentence is clearly valid."

Petitioner argues that we have said, as late as in the case of People v. Harwood, 286 Mich. 96, that:

> "Length of imprisonment for felony is for legislative determination and not subject to judicial supervision."

See also People v. Morris, 80 Mich. 634, 637 (8 L. R. A. 685); People v. Smith, 94 Mich. 644; People v. Whitney, 105 Mich. 622; and People v. Palm, 245 Mich. 396. This statement, repeated in all these cases, must be considered in the light of its context. In each of these cases it was argued that the penalty as fixed by the Legislature constituted cruel and unusual punishment in violation of State and Federal Constitutions. None of these cases involved delegation of power.

In the Palm case it was pointed out that the discretion of the trial court as to maximum sentences was taken away by a statute which imposed a mandatory life sentence in certain instances for fourth offenders. See 3 Comp. Laws 1929, 17340 (Stat. Ann. 28.1084).

It is interesting to note that former attacks upon the indeterminate sentence law heve been on the ground that the statute deprived the courts of their discretionary power and delegated control over sentence either to administrative or executive bodies, in violation of constitutional safeguards. See People v. Cummings, 88 Mich. 249 (14 L. R. A. 285), and People v. Cook, 147 Mich. 127.

Objection to the delegation of the power of the judiciary over sentences was met by the constitutional amendment of 1902 (Art. IV, 47, Const. 1850, as amended, and Art. V. 28, Const. 1908). The amendment did not take away the inherent judicial power to exercise discretion in the imposition of sentences. That power always resided in the judiciary and there it must remain until curtailed or removed by the Legislature. Examination of the penalties imposed for various crimes, as shown in the Penal Code (Act No. 328, Pub. Acts 1931 (Stat. Ann. 28.191 et seq.)) indicate legislative recognition and adherence to the policy of the exercise of discretion by the sentencing judge within the maximum limits therein imposed. This discretion extends to the amount of fine and imprisonment up to the statutory maximum and to the alternative of fine or imprisonment.

Blackstone comments on the inherent discretionary power of courts over amounts of fines and length of imprisonment. See Book IV, Chap, XXIX, Cooley's Blackstone, Fourth Edition, Vol. II, p. 1510 et seq.

Prior to Act No. 175 Pub. Acts 1927 (Code of Criminal Procedure), the minimum sentence for those imprisoned in the state prison, etc., was not less than six months in any case. Compare 3 Comp. Laws 1915, 15859, and 3 Comp. Laws 1929, 17336. The 1927 act permitted the trial judge to exercise his discretion in fixing the minimum term except in a case where this discretion was specifically denied. This enactment of a code of criminal procedure of necessity imposed a duty upon the sentencing judge to consider the limitations placed by the Legislature upon penalties for specific crimes.

The policy expressed by the people, in providing by constitutional amendment for an indeterminate sentence law, directed the Legislature to adopt a flexible law and the courts to fit the punishment in the exercise of their discretion to the needs of the particular case. In no other way could the will of the people be carried into effect. A discretion must be exercised in order to have indeterminate sentences. Such application of the law is not a violation of the constitutional inhibition against Delegation of power. As said in re Manaca, 146 Mich. 697, quoting Dwyer v. Illinois, 187 U. S. 71:

> "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. "when we speak," said Story, "of a separation of the three great departments of government and maintain that

that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution." 1 Story on the Constitution (5th Ed.), p. 393. Again: "Indeed, there is not a single constitution of any State in the Union which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it." 1 Story on the Constitution (5th Ed.), p. 395.' "

In re Campbell, 138 Mich. 597, the court said:

"Petitioner also urges that, as thus construed, the indeterminate sentence law is unconstitutional, because the 'imposition of a sentence is a judicial act, and the exercise of discretion relative to the term of imprisonment is a judicial function,' which, under our Constitution, can be exercised only by certain specified courts. This argument assails the constitutionality of characteristic and essential features of the indeterminate sentence law. We must hold that the constitutional amendment (see Pub. Acts 1903, p. 452) which gave the legislature express authority to enact such a law gave it authority to enact a law containing these features."

We again hold that the indeterminate sentence law is constitutional.

Southard was convicted of the crime of robbery-armed, for which he might have been sentenced "for life or for any term of years." (529, Penal Code, 3 Comp. Laws 1929, 16722 (Stat. Ann. 28.797)). As a third offender, on which charge he was also convicted, he might have been

sentenced to imprisonment for life or for a term of not less than 7½ years. (See ..... Sec. 11 of the Code of Criminal Procedure, 3 Comp. Laws 1929, 17339 (Stat. Ann 28.1083)). He was sentenced to serve a minimum term of 15 years and a maximum term of 25 years.

Justice does not demand that Southard's sentence be vacated and he has presented no argument which moves this court to hold that his constitutional rights have been violated.

The writ of habeas corpus is denied.

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 538

HARRY N. SOUTHARD,
Petitioner,

v.

HARRY JACKSON, Warden, State Prison of Southern Michigan, Jackson, Michigan,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF MICHIGAN

HERBERT J. RUSHTON,
Attorney General of the State of Michigan.

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Solicitor General of the State of Michigan.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF MICHIGAN

I

CONCISE STATEMENT OF CASE

Petitioner seeks a writ of certiorari to review an opinion (R. 22) and order (R. 28) of the supreme court of the State of Michigan, dismissing a writ of habeas corpus to inquire into the cause of his imprisonment and detention by the warden of the state prison of southern Mich-

igan (R. 14, 15), and an ancillary writ of certiorari directed to the judge of the trial court before whom petitioner had been convicted of a criminal offense (R. 17).

In the trial court, on the 1st day of November, 1933, petitioner was duly convicted of the statutory crime of robbery while armed with a dangerous weapon (R. 11, 12, 13), upon an information charging it to be a third offense (R. 8, 9) for which augmented punishment was, and is, provided, and was thereupon sentenced to be confined in the Michigan state prison for a minimum term of fifteen (15) years, a maximum term of twenty-five (25) years (R. 20). A motion to vacate the sentence was denied by the circuit judge on March 14, 1936 (R. 20, 21); a motion to reduce sentence was denied March 29, 1938 (R. 21); and a further motion to vacate and discharge the sentence was denied January 7, 1939 (R. 22).

No appeal [in the nature of a writ of error] was taken to the supreme court of the State of Michigan.

Statutes Involved

The Michigan legislature has enacted two separate and distinct codes pertaining to crime and punishment therefor: [1st] the 'Penal Code', defining crimes and prescribing the penalties therefor (Act No. 328, Public Acts 1937, as amended [Comp. Laws Supp., § 17115 (1) *et seq.*, Stat. Ann. § 28.191 *et seq.*]), and [2d] the 'Code of Criminal Procedure', revising, consolidating and codifying the laws relating to criminal procedure and, among other specific things, providing 'for judgments and sentences of persons convicted of criminal offenses' (Act No. 175, Public Acts 1927, as amended (Comp. Laws 1929, as amended, § 17116 *et seq.*, Stat. Ann. § 28.843 *et seq.*)).

Section 529 of the 'Penal Code' (Comp. Laws Supp. § 17115 (529), Stat. Ann. § 28.797) defines the offense of robbery, while armed with a dangerous weapon and provides punishment therefor 'by imprisonment in the state prison for life or any number of years'.

[Appendix 'A', printed at the back of this brief, is a true copy of the foregoing section of the 'Penal Code'].

The 'Code of Criminal Procedure', chapter IX (dealing with 'judgment and sentence'), provides for an indeterminate sentence for a first offense, the trial court to fix the minimum term § 8), while §§ 9-12, incl., thereof (the 'habitual criminal provisions', so-called) provide augmented punishment for second and third offenders (Comp. Laws 1929, § 17336 *et seq.*, Stat. Ann. § 28.1080 *et seq.*).

[Appendix 'B' is a true copy of the foregoing sections of the 'Code of Criminal Procedure'].

Seven years, three months, and twenty-five days after his conviction as a *third* offender, plaintiff sought release on the ground that § 8, chapter 9, of the 'Code of Criminal Procedure', providing an indeterminate sentence for a *first* offender, is unconstitutional.

Petitioner's argument in the Michigan supreme court [boiled down somewhat] was that § 8, *supra*, unlawfully delegates to members of the judicial department of government the legislative power to fix a minimum term of imprisonment for crime, and thus violates the Federal (14th Amendment) and State Constitution § 1, article 4).

Therefore, it was said, the circuit court had no jurisdiction over the person of the petitioner and was powerless to admeasure punishment.

The supreme court of Michigan, in dismissing the writs of habeas corpus and certiorari, held, primarily, that petitioner's more appropriate remedy would have been a timely application for leave to appeal from conviction and sentence, rather than a belated petition for release on habeas corpus; and, secondarily, that, in its opinion, the section of the code under attack was valid and constitutional (R. 22-28).

Article 5, § 28, of the Michigan Constitution provides that

> "Sec. 28. The legislature may provide by law for indeterminate sentences, so-called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences".

Although this section of the State Constitution was not cited or mentioned in the petition for habeas corpus filed with the Michigan supreme court, petitioner's argument in this Court is now based on the new contention that the sections of the code in question violate that section of Michigan fundamental law.

II

OBJECTIONS TO PETITION FOR WRIT

[ARGUMENT]

We submit the following objections to the issuance of the writ of certiorari:—

First: The petition does not contain the 'jurisdictional statement' required by Rule 12 (1) of this Court.

Second: The judgment of the state court was based upon an independent ground of state procedure involving no federal question and broad enough to sustain the order dismissing the writs.

The Michigan supreme court held that petitioner's right of review was by appeal, not by habeas corpus, and observed

> "We have thus repeatedly held that habeas corpus will not be permitted to perform the functions of a writ of error".

This position is well sustained by authority, including that of this Court,

In re Palm, 255 Mich. 632,
In re Gardner, 260 Mich. 122,
In re Long, 266 Mich. 269 [*Long v. Michigan*, 292 U. S. 647, 293 U. S. 629],
In re Van Dyke, 276 Mich. 32 [*Van Dyke v. Michigan*, 299 U. S. 608],
In re Lupu, 285 Mich. 500,

In re Offill, 293 Mich. 416 (writ denied by this court),
In re Brazell, 293 Mich. 632,
In re Stone, 295 Mich. 207.

See, more particularly,

Doyle v. Atwell, 261 U. S. 590.

Third: Petitioner was not sentenced under authority of that section of the 'Code of Criminal Procedure' which he attacks, and is not in position to complain of its validity,

People v. Cook, 147 Mich. 127.

Furthermore, he was subject to life imprisonment, in any event, under the 'Penal Code'.

Fourth: The point now urged in petitioner's brief (that § 8, chapter 9, Code of Criminal Procedure, violates article 5, § 28, of the Michigan Constitution) was not raised in the court below, and should not be considered here,

Young v. Masci, 289 U. S. 253.

Fifth: Petitioner's objection that the state statute here in question involves an unconstitutional delegation of legislative power does not present a Federal question which this Court may consider,

Ohio ex rel. Bryant v. Akron Metro. Park Dist., 281 U. S. 74.

The case of *Ughbanks v. Armstrong*, 208 U. S. 481, considering the indeterminate sentence law of Michigan, may be helpful.

III

CONCLUSION

For the several reasons set forth in this brief, we respectfully submit that the writ of certiorari should be denied.

HERBERT J. RUSHTON,
Attorney General of the State of Michigan,

EDMUND E. SHEPHERD,
Solicitor General of the State of Michigan,
For Respondent.

APPENDIX 'A'

Section 529, Michigan Penal Code

Sec. 529. Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the persons so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

APPENDIX 'B'

Michigan 'Code of Criminal Procedure', Chap. IX, §§ 8-12

Sec. 8. When any person shall hereafter be convicted for the first time of crime committed after this act takes effect, the punishment for which prescribed by law may be imprisonment in the state prison at Jackson, the Michigan reformatory at Ionia, the state house of correction and branch of the state prison in the upper peninsula, the Detroit house of correction, or any other prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term except as hereinafter provided. The maximum penalty provided by law shall be the maximum sentence in all cases except as herein provided and shall be stated by the judge in passing sentence. He shall before or at the time of passing such sentence ascertain by examination of such convict on oath, or otherwise, and by such other

evidence as can be obtained tending to indicate briefly the causes of the criminal character or conduct of such convict, which facts and such other facts as shall appear to be pertinent in the case, he shall cause to be entered upon the minutes of the court.

Sec. 9. The provisions of this chapter, relative to indeterminate sentences, shall not apply to any person convicted of an offense, the only punishment for which prescribed by law is imprisonment for life: Provided, That in all cases where the maximum sentence in the discretion of the court may be for life or any number of years, the court imposing the sentence shall fix both the minimum and maximum sentence.

Sec. 10. A person, who after having been convicted within this state of a felony, or an attempt to commit a felony, or, under the laws of any other state, government or country, of a crime which if committed within this state, would be a felony, commits any felony within this state, is punishable upon conviction as follows: If the subsequent felony is such that, upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than one-half of the longest term nor more than one and one-half times the longest term prescribed for a first conviction of such offense; if the subsequent felony is such that, upon a first conviction the offender might be punished by imprisonment for life then such person must be sentenced to imprisonment for life or for a term of not less than five years.

Sec. 11. A person who after having been twice convicted within this state of a felony or an attempt to com-

mit a felony, or under the laws of any other states, governments or countries, of a crime which if committed within this state would be a felony, commits any felony within this state, is punishable upon conviction as follows: If the felony for which such offender is tried is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term nor more than twice the longest term prescribed by law for a first conviction of such offense; if the subsequent felony is such that, upon a first conviction the offender might be punished by imprisonment for life then such person must be sentenced to imprisonment for life or for a term of not less than seven and one-half years.

Sec. 12. A person who after having been three times convicted within this state, of felonies or attempts to commit felonies, or under the law of any other state, government or country, of crimes which if committed within this state would be felonious, commits any felony within this state is punishable upon conviction as follows: If the felony for which such offender is tried is such that upon a first conviction thereof the offender might be imprisoned in a state prison for a maximum term of five years or more, or for life, then such person must be sentenced upon conviction of such fourth or subsequent offense to imprisonment in a state prison for the term of his natural life; if the felony for which such offender is tried is such that upon a first conviction thereof the offender could not be imprisoned in a state prison for a maximum term of five years or more, or for life, then such person must be sentenced to imprisonment in a state prison for a term not less than seven and one-half years nor more than fifteen years. Offenders sen-

tenced under this and the last two preceding sections shall not be eligible to parole before the expiration of the minimum term fixed by the sentencing judge at the time of sentence without the written approval of the judge of such court or any judge of such court if the sentencing judge is not then serving. A person to be punishable under this and the last two preceding sections need not have been indicted and convicted as a previous offender in order to receive the increased punishment therein provided, but may be proceeded against as provided in the following section.